

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1930

To be argued by
Roy L. Reardon

74-1930

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

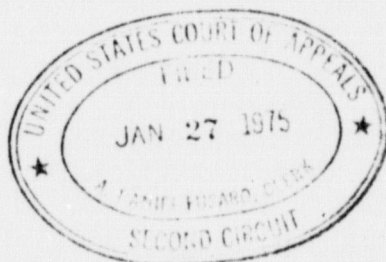
Plaintiff-Appellee

v.

SERGIO POBLETE

Defendant-Appellant

BRIEF FOR DEFENDANT-APPELLANT
SERGIO POBLETE



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,	:	
Plaintiff-	:	
Appellee,	:	
-against-	:	Docket No. 74-1930
SERGIO POBLETE,	:	
Defendant-	:	
Appellant.	:	

- - - - -X

BRIEF FOR DEFENDANT-APPELLANT
SERGIO POBLETE

PRELIMINARY STATEMENT

On May 17, 1974, Sergio Poblete ("Poblete"), the appellant herein, waived indictment and pled guilty to an information charging him with conspiracy to distribute cocaine not in the original stamped package in violation of 26 U.S.C. §4704(a) (1970). One week later, Poblete's assigned counsel became aware of this Court's decision in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974)* (Tr. 6).** Poblete's counsel then moved on July 8, 1974, to dismiss both the

* The decision in Toscanino was rendered on May 15, 1974.

** References are to the page of the transcript of the hearing and sentencing held July 8, 1974.

indictment and information* on the grounds that the district court lacked jurisdiction over Poblete as a result of constitutional infringements on Poblete's rights in derogation of the principles enunciated by this Court in Toscanino. In response to Poblete's motion, an evidentiary hearing was immediately held and testimony elicited from Poblete as to the outrageous and shocking manner in which he was abducted from his home in Chile, subjected to brutal interrogation and torture, and subsequently delivered into the custody of federal agents who transported him to this country for trial. The United States offered no testimonial or documentary evidence to refute Poblete's account, other than the totally unsupported and self-serving denials of counsel for the government. Nevertheless, the district court, although expressly recognizing the reality of the outrageous treatment which Poblete suffered, denied the motion to dismiss. It is this disposition which Poblete challenges on appeal.

* Poblete's assigned counsel also requested that Poblete be permitted to withdraw his prior plea of guilty and enter a plea of not guilty. The district court peremptorily denied this motion stating:

"There is no reason to permit the withdrawal of the plea. The inquiry made by the Court indicates that the defendant is guilty, and the only issue is whether the Court has jurisdiction. On that question I will hear you." (Tr. 7).

ISSUE PRESENTED

Whether the trial court's determination that Poblete's forceable arrest, torture and involuntary return to the United States did not constitute a violation of Poblete's constitutional rights and did not warrant a dismissal of the information and indictment was erroneous in light of this Court's decision in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

STATEMENT OF FACTS

In an indictment filed on July 20, 1972, Poblete was charged with conspiracy to import cocaine into the United States in violation of 21 U.S.C. §173 and 174.

On November 13, 1973, Poblete was arrested in Chile, tortured, and interrogated as to his activities in the United States. He remained in the custody of the Chilean police until May 4, 1974, when he was expelled from Chile. Although under the laws of Chile Poblete should have been given some choice as to his destination upon expulsion, he was delivered to American agents who transported him to the United States. Poblete was then assigned counsel of the Federal Defender Services Unit/the Legal Aid Society, arraigned and entered a plea of not guilty. On May 17, 1974, upon the advice and assistance of assigned counsel, Poblete waived

indictment and pled guilty in the United States District Court for the Eastern District of New York (before The Honorable Jack B. Weinstein) to an information charging him with the distribution of cocaine not in the original stamped package in violation of 26. U.S.C. §4704(a) (1973). Sentencing was adjourned pending preparation of a probation report.

By motion dated July 5, 1974, Poblete's assigned counsel, Edward J. Kelly, moved to dismiss the information and indictment filed against Poblete for lack of jurisdiction as a result of the shocking and outrageous circumstances surrounding Poblete's abduction and involuntary return to the United States.

At the evidentiary hearing granted by Judge Weinstein on the motion, Poblete testified that he had been arrested in Annergusto, Chile at the request of government authorities of the United States (Tr. 16). Poblete was held there for seven days and questioned as to his narcotics activities while in the United States (Tr. 17-18). During this period, he claimed that he was tortured. He was then moved to Santiago where he was again interrogated for a period of ten to fifteen days. Poblete was subjected to further tortures, including the application of electric shocks, and as a result his cheek bone and nose were broken and a nail pulled out

from his right hand. The Court took judicial notice of the injuries that resulted from these tortures (Tr. 19-20).

According to his testimony, Poblete was arrested, moved to Santiago and eventually to the United States, all at the "order of the United States" (Tr. 17-18, 22). Poblete stated that he was aware of the presence of American agents in Santiago and that throughout his interrogation and torture he was aware of the presence of foreigners, possibly Americans (Tr. 21). In May, 1974 Poblete was flown to the United States in the custody of American and Chilean officers (Tr. 21-22).

Ivan S. Fisher, an attorney with knowledge of similar arrests, interrogation and expulsion of Chileans* accused of violating American drug laws and the difficulty of obtaining witnesses to prisoner interrogation in Chile, was called as a witness by Poblete's attorney. But Judge Weinstein sustained the prosecutor's objection to the testimony of this witness on the ground that Fisher had no first-hand knowledge of the Poblete incident (Tr. 31-32).

* Fisher represented one Carlos Baeza who was expelled to the United States with appellant Poblete. Affidavit of Edward J. Kelly in Support of Defendant's Motion to Dismiss, July 5, 1974 at pp. 3-4.

Judge Weinstein, however, admitted a statement by Assistant United States Attorney Bernard Fried as to American involvement in the arrest. Fried stated that he had "inquired" into the arrest of Poblete and others expelled with him and was informed that the Americans had not participated in Poblete's arrest and interrogation (Tr. 32-33). Fried neither affirmed nor denied Poblete's assertion that he was arrested on orders of the United States. The prosecution offered no independent evidence or proof that the United States Government did not order or participate in the interrogation of Poblete.

On the basis of this testimony Judge Weinstein held that the court had properly exercised jurisdiction over Poblete and sentenced him to imprisonment for a term of five years* (Tr. 35-36, 40).

* In sentencing Poblete, Judge Weinstein took notice of the suffering which Poblete had undergone during his interrogation in Chile (Tr. 40).

ARGUMENT

POINT I

POBLETE'S FORCEABLE ARREST AND TORTURE BY CHILEAN POLICE AND INVOLUNTARY RETURN TO THE UNITED STATES AT THE REQUEST OF THE UNITED STATES GOVERNMENT WAS A DENIAL OF DUE PROCESS IN DEROGATION OF POBLETE'S RIGHTS AS ARTICULATED BY THIS COURT IN UNITED STATES v. TOSCANINO, 500 F.2d 267 (2d Cir. 1974).

The circumstances surrounding Poblete's arrest, interrogation and involuntary return to the United States meet the standard of outrageous and shocking conduct which under Toscanino require the district court to divest itself of jurisdiction. This Court there held:

"we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct. . .and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, which guarantees the right of the people to be secure in their persons against unreasonable seizures, the government should as a matter of fundamental fairness be obligated to return him to his status quo ante. . . Accordingly we view due process as now requiring a court to divest itself of jurisdiction where it has been acquired as the

result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. . . In this case we may rely simply upon our supervisory power over the administration of criminal justice in the district courts within our jurisdiction. . .," 500 F.2d at 275-276

Prior to the decision in Toscanino it was the rule in the Second Circuit that due process was:

"limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant. Jurisdiction gained through an indisputably, illegal act might still be exercised even though the effect could be to reward police brutality and lawlessness in some cases." 500 F.2d at 272.

This was the so-called Ker-Frisbie rule. The ruling in Toscanino, however, embraced the interpretation of due process adopted by Rochin v. California, 342 U.S. 165 (1952), which requires

"an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples." 342 U.S. at 172.

In expanding the requirements of due process to include the means by which a court obtains jurisdiction over the person of the defendant,* this Court relied on such

* In United States v. Russell, 411 U.S. 423, 431-32, (1973), the United States Supreme Court recognized that the requirements of due process encompass the pre-trial conduct of law enforcement officers.

Supreme Court decisions as Mapp v. Ohio, 367 U.S. 643 (1961), Miranda v. Arizona, 384 U.S. 436 (1966) and Wong Sun v. United States, 371 U.S. 471 (1963), to support its rejection of the narrow Ker-Frisbie view of due process in favor of one which would prohibit the government from "realizing the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial." 500 F.2d at 272.

When conduct by the government or its agents in connection with the prosecution of a crime "shocks the conscience", the Supreme Court has often applied an exclusionary rule of this type so that the "fruits" of such misconduct may not be used to obtain a conviction. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961). Since there is no "fruit" of an abduction which can be suppressed other than the conviction which may ensue, this Court in Toscanino provided that the remedy for an abduction with attendant violation of a defendant's constitutional rights is a dismissal of the charges for lack of jurisdiction. See also, Lujan v. Gengler, Docket No. 74-2084 at 1204 (E.D.N.Y. January 8, 1975).

The conduct alleged by Poblete during the hearing, when compared to that in Toscanino, is equally outrageous and warrants a dismissal of this case for lack of jurisdiction. Poblete was arrested by Chilean police at the request of the

United States (Tr. 17). He was then moved to Santiago for further questioning on order of the United States (Tr. 18). During this time he was beaten and brutally tortured. Electrodes were attached to his testicles and to other parts of his body and electric shocks were administered. In addition, he was hung from his arms, his cheekbone and nose were broken and a fingernail was torn from his right hand (Tr. 17-20).^{*} Thereafter, he was delivered into the custody of American agents who transported him to the United States for trial. This chain of events clearly describes the inhuman conduct condemned by this Court in Toscanino. This conduct, which was never contradicted by competent government evidence, was of such an outrageous and shocking nature that the district court, in accord with the principles of due process set forth in Toscanino, should have divested itself of jurisdiction and dismissed the indictment and information.

* The district court, itself, recognized that Poblete's body showed physical evidence of such torture (Tr. 18-19).

POINT II

THE DENIAL OF POBLETE'S
MOTION TO DISMISS FOR LACK
OF JURISDICTION WAS IMPROPER

The court in Toscanino determined that an evidentiary hearing as to a defendant's allegations of forcible abduction with attendant violations of his constitutional rights by or at the direction of United States officials must be held if there is some credible supporting evidence of such violations and of United States involvement. In granting Poblete such a hearing, Judge Weinstein concluded that the evidence presented in the affidavit of Poblete's attorney supporting the motion for dismissal of the information and indictment was sufficiently credible to warrant a full evidentiary hearing as to the truth of the allegations. Once a hearing has been granted, Toscanino requires the government "to respond" to the allegations of misconduct as to the method by which a defendant has been delivered to the jurisdiction of the district court. 500 F.2d at 268.

Poblete testified that he was told his arrest was upon the order of the United States. Poblete was subjected to torture and other outrageous treatment following that arrest and was interrogated primarily as to his activities while he was in the United States. The fact that he was

delivered to American authorities in violation of Chilean law as to expulsion supports his allegations of American involvement in his arrest and abduction.

Assistant United States Attorney Bernard Fried called no witnesses and offered no documentary evidence to refute Poblete's claims. Fried did not deny the torture alleged by Poblete. Nor did he deny that American authorities requested or had knowledge of his arrest. The only evidence offered by the United States was the unsworn statement of the Assistant United States Attorney Fried that he had been in Chile on another case and had "inquired into the circumstances" surrounding the expulsions of Poblete and others and was told that American agents in Chile were not involved in these expulsions. Fried did not identify the sources of his information nor did he offer evidence as to the basis of their conclusions.* Despite the failure of the government to show that it had not participated in or requested Poblete's arrest and abduction, Judge Weinstein found that the district court could properly assert jurisdiction over Poblete.

* These unsupported assumptions and conclusion on the part of Fried can in no way be considered as trustworthy and reliable as the first-hand knowledge of the interaction between Chilean and United States authorities that Fisher would have related had the district court permitted Fisher to testify over Fried's objection. (See p.5, supra.).

The court erred in such finding. The prosecution's failure to produce competent evidence at the hearing to rebut Poblete's allegations warrants the dismissal of the indictment and information.

Where a constitutional violation has been alleged by a defendant, in a criminal case, the burden of proof is on the prosecution to present evidence to rebut such allegations. The Supreme Court held in Jackson v. Denno, 378 U.S. 368 (1968) that the issue of voluntariness of a confession must be resolved in a full and fair hearing conducted by the court outside the hearing of the jury, that the burden of proving voluntariness is on the government and that to meet this burden the government must call material witnesses.

These principles were recently applied by the Supreme Court in Lego v. Twomey, 404 U.S. 477 (1972), where the defendant claimed that he had confessed to armed robbery only after he was beaten by the police. To refute the claim that the confession was obtained through police brutality and to establish that the defendant's confession was in fact voluntary, the police officers involved in the arrest testified at the hearing. The trial judge resolved the issue of credibility in favor of the police and admitted the confession. In affirming the lower court's ruling, the

Supreme Court noted that the government had met its burden of proving by a preponderance of the evidence that the confession was voluntary. 370 U.S. at 484-86.

The prosecution's obligation to call material witnesses to meet its burden of proof at an evidentiary hearing where alleged violation of constitutional rights is in issue, was discussed by the Supreme Court in Sims v. Georgia, 389 U.S. 404 (1967). In Sims, an evidentiary hearing was held after the defendant challenged the voluntariness of a confession allegedly made after he was beaten by police in a doctor's office. The record showed that the trial court had made no express finding on this issue before the allegedly involuntary confession was admitted as evidence before the jury. The Court remanded for a full hearing and finding by the trial judge noting that: "[N]one of the officers present during the incident were produced as witnesses. Petitioner's claim of mistreatment, therefore, went uncontradicted as to the officers." Sims v. Georgia, 385 U.S. 538 (1967). On remand, basing its decision solely on the record below which included only the testimony of the defendant and the doctor in whose office the alleged conduct occurred, the trial judge found the confession voluntary. The Supreme Court in again reviewing Sims reversed and remanded, holding that there was insufficient evidence on the prior record alone,

to rebut defendant's contention that his confession had been forceably obtained. The court further said that:

"[I]n remanding the case for a hearing on voluntariness we indicated to the State that as the evidence then stood it had failed adequately to rebut petitioner's testimony that he had been subjected to physical violence prior to his confession. The State had every opportunity to offer the police officers, whose failure to testify had already been commented upon here, to contradict petitioner's version of the events. Its failure to do so when given a second chance lends support to the conclusion that their testimony would not, in fact, have rebutted petitioner's." 389 U.S. at 406 (emphasis added).

Sims does not place a burden on the prosecution at an evidentiary hearing to produce every person with knowledge of alleged constitutional violations, but it does require the prosecution to call some witnesses with first-hand knowledge of the events in question.* In interpreting the extent of this duty, the Fifth Circuit stated:

"Sims did not hold that the prosecution must produce all officers present. It only stands for the proposition that the failure to call any officers to rebut the defendant's allegations of

* State Courts dealing with the issues similar to those raised in Sims have uniformly held that the prosecution has the burden of producing material witnesses with first-hand knowledge of alleged unconstitutional incidents. See, Smith v. State, 494 S.W.2d 489 (Ark. 1973); People v. Armstrong, 51 Ill.2d 471, 282 N.E.2d 712 (1972); Stevens v. State, 228 So.2d 888 (Miss. 1969); Mercer v. State, 237 Md. 479, 206 A.2d 797 (1965).

coercive conduct justifies a presumption that such rebuttal was impossible." United States v. Hathorn, 451 F.2d 1337, 1339 (5th Cir. 1971) (emphasis in original).

In the instant case, the government had the obligation of producing witnesses competent to testify as to the nature of American involvement in Poblete's abduction, torture and return to the United States. The government completely failed, however, to offer competent testimony which would have rebutted Poblete's claims. In fact, there was a complete absence of any direct testimony by the agents or officers who ordered Poblete's arrest or brought him to the United States. Instead, Assistant United States Attorney Fried proffered a totally unsupported statement as to the absence of American involvement in this matter. This "evidence" on the part of Fried who admittedly had no personal knowledge of Poblete's arrest and interrogation could in no way serve to rebut or even deny Poblete's claims. The burden of proof placed on the government in cases where a showing of a violation of constitutional rights has been made by defendant sufficient to mandate a hearing cannot be said to have been met by the unsworn statement of an Assistant United States Attorney as to the general non-involvement of authorities of the United States.

The credibility of Assistant United States Attorney Fried is not in question. Rather, it is whether his

statement is sufficiently competent of meeting the burden of proving that Poblete was not before the court in violation of his Fourth Amendment rights. It is not contested that the issue of constitutionality may be resolved on the question of credibility of two conflicting but competent witnesses. But even where the issue of credibility has been resolved in the favor of government witnesses, that testimony, taken as true, must be still sufficient to meet the burden of proof by its content sufficient to meet constitutional standards of protection. See, e.g., United States v. DeCiccio, 190 F. Supp. 483 (E.D.N.Y. 1961).

At the hearing Judge Weinstein permitted Assistant United States Attorney Fried to state as a response to Poblete's allegations that while on a business trip involving another case*:

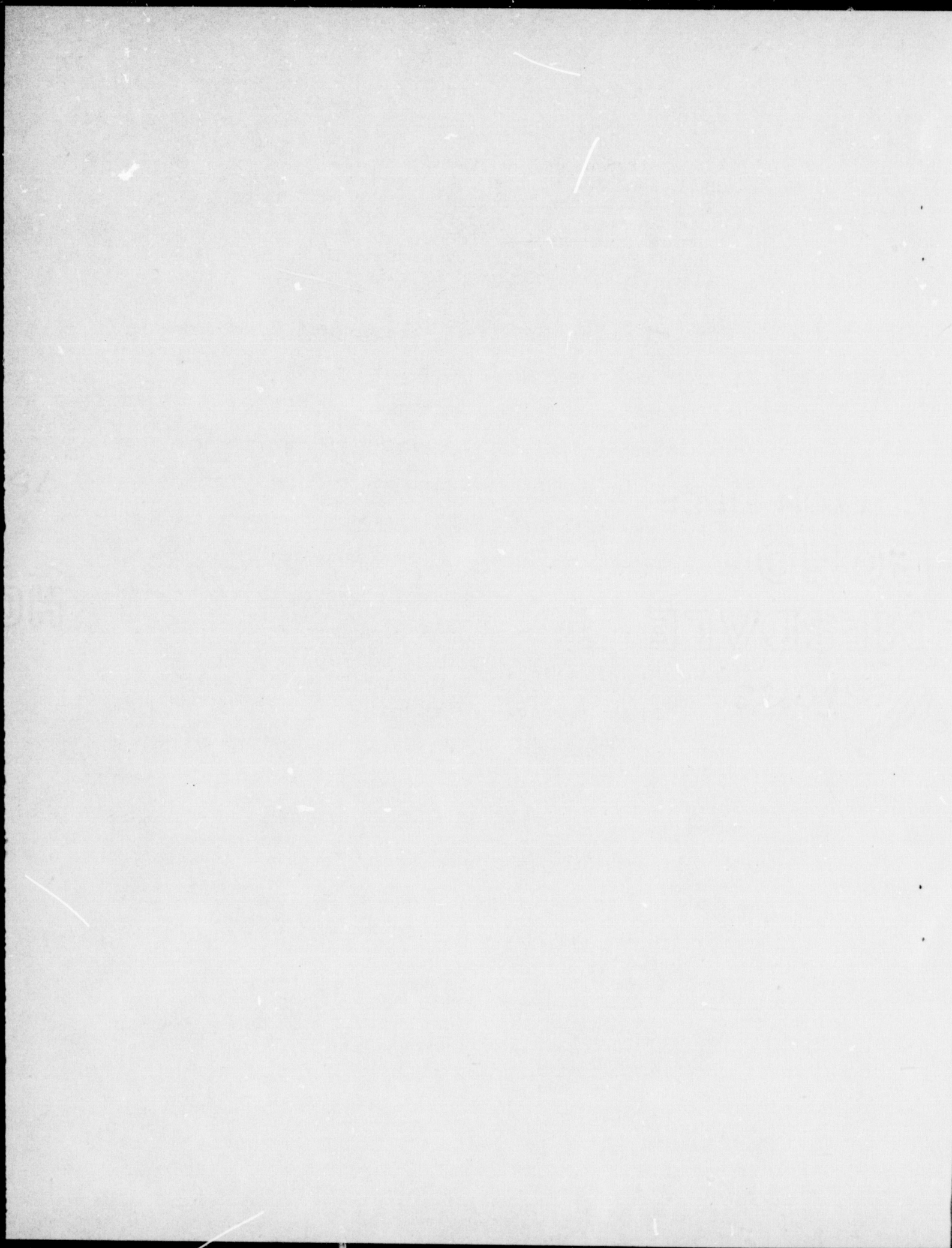
* The case was United States v. Baeza, supra p. 5. Kelly intended to use the testimony of the attorney for the defense in that case to establish that the difficulty of obtaining the cooperation of the agents of foreign countries or of American agents operating in such countries places a burden on the government to come forward with evidence as to the United States role in Poblete's arrest and interrogation in Chile and his delivery to United States custody. The basis for such obligation is found in Brady v. Maryland, 373 U.S. 83 (1963) where the prosecution in a criminal case was held to have a responsibility to reveal to the defense evidence solely in its possession which could raise a reasonable doubt as to the guilt of the defendant. The Court held that to suppress such evidence was a denial of due process. The principle of Brady should like-wise apply to evidentiary hearings involving constitutional rights. The government having the duty to respond to allegations involving constitutional rights should make available any evidence it has as to its role in allegedly unconstitutional conduct. To hold otherwise would place the burden of proof on the defendant and relieve the government of its obligations to ensure that justice is administered in its courts. See, Brady 373 U.S. at 87.

"I inquired into the circumstances of the expulsions and whether the American authorities, the American agents down there participated, and I was informed that the American authorities did not aid or procure counsel for any of the expulsions that are alleged to have occurred in this case".
(Tr. 33)

This statement is the extent of the government's response to Poblete's claim that the authorities of the United States requested and were aware of his arrest and interrogation* by Chilean authorities and may, perhaps, have participated in his interrogation and torture. For the court to have judged such statement a "response" as required by Toscanino is to have assumed as true unsworn statements of unidentified, out of court persons whose testimony Poblete could not challenge. There was no response by the government to Poblete's allegations.

In the absence of a preponderance of the evidence beyond a mere disclaimer establishing the non-involvement of American agents, Poblete's indictment and information should have been dismissed. Poblete's testimony as to the subject of his interrogation, the presence of foreign interrogators, the recognized effect upon him of torture, and his delivery to American authorities, amounted to credible evidence of

* Poblete testified that he had been told he was arrested at the request of the United States (Tr. 18).



American involvement in the shocking and outrageous conduct which culminated in his presence before the district court. The evidence presented by the prosecution was insufficient to defeat Poblete's allegations of outrageous conduct in connection with his return to the United States.

CONCLUSION

THE JURISDICTIONAL FINDING OF THE COURT BELOW WAS CLEARLY ERRONEOUS, AND SHOULD BE REVERSED AND THE INDICTMENT AND INFORMATION AGAINST DEFENDANT-APPELLANT POBLETE SHOULD BE DISMISSED.

Respectfully submitted,

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